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TOLL BROTHERS, INC.

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 PETER SWALLOW,

17 Plaintiff,

18 vs.

19 TOLL BROTHERS, INC.; AND DOES
1-25, INCLUSIVE,

20 Defendants.
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Case No. C 08-2311 JCS

**DEFENDANT'S OPPOSITION TO
MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: August 29, 2008
Time: 1:30 p.m.
Judge: Honorable Joseph C. Spero

Complaint Filed: April 3, 2008
Trial Date: None Set

1 **I. INTRODUCTION.**

2 Plaintiff Peter Swallow ("Plaintiff") began his employment with Toll Brothers,
3 Inc. ("Toll") in August 1999, as a Project Manager. On or about November 1, 2001,
4 as one of the terms and conditions of his employment, Plaintiff entered into an
5 express, written arbitration agreement with Toll. On April 5, 2007, Plaintiff was
6 terminated from his employment with Toll for misconduct.

7 On April 3, 2008, Plaintiff filed an action against Toll in the Superior Court
8 of the State of California in the County of Contra Costa. The Complaint alleged two
9 causes of action: defamation and slander per se. A copy of the Complaint in the
10 Action is attached hereto as Exhibit "A" to the Declaration of Jason A. Weiss
11 ("Weiss Decl.").

12 On April 8, 2008, Toll's agent for service of process was served with a
13 peremptory challenge. (See Weiss Decl., ¶ 3.) Therefore, Toll's counsel
14 appropriately filed an Answer and Notice of Removal since the 30 day time period
15 to remove the Complaint had been triggered pursuant to 28 USC §§ 1446, 1447.
16 Contrary to Plaintiff's counsel's assertion, Toll did not "jump" service, but took
17 appropriate steps to timely remove the action to federal court.

18 Although Plaintiff's counsel spoke with Tim Hoban, Regional Counsel for
19 Toll, Mr. Hoban does not recall Plaintiff's counsel ever requesting a tolling
20 agreement for purposes of obtaining a Right-To-Sue letter from the Department of
21 Fair Employment and Housing. (See Declaration of Timothy J. Hoban ("Hoban
22 Decl."), attached hereto, ¶ 2.) In addition, Mr. Hoban informed Plaintiff's counsel
23 that Plaintiff is subject to an arbitration agreement. (Hoban Decl., ¶ 3.)

24 Since the case was removed to federal court, defense counsel has repeatedly
25 requested that Plaintiff submit to arbitration, however, Plaintiff's counsel has refused
26 to respond. (Weiss Decl., ¶ 4.) After multiple attempts to meet and confer, Toll was
27 forced to file a Motion to Compel Arbitration and to Stay the Proceedings on June 4,
28 2008. (Id.)

Two weeks after the filing of the Motion to Compel Arbitration and to Stay the Proceedings, Plaintiff's counsel requested Toll's stipulation to the filing of an amended complaint. (Weiss Decl., ¶ 5.) Defense counsel informed Plaintiff's counsel that it made more sense for both parties to address such issues after the appropriate forum for this lawsuit was determined. (Weiss Decl., ¶ 5.) In e-mail correspondence, Defense counsel repeatedly requested a copy of the proposed amended complaint, which it never received prior to Plaintiff filing this motion. (Weiss Decl., ¶ 6.) Although Toll attempted to meet and confer with Plaintiff's counsel regarding the requested stipulation, it was understandably unable to agree to an amendment that was never provided to Defense counsel nor explained in any detail.

Upon receipt of the motion, Defense counsel noticed that Plaintiff seeks to add *three* additional causes of action for age discrimination, breach of contract, and breach of covenant of good faith and fair dealing. Plaintiff's counsel has never provided notice nor mentioned a potential claim for breach of contract and/or breach of covenant of good faith and fair dealing. (Weiss Decl., ¶ 7.) Moreover, there is no administrative exhaustion requirement that would justify the delay in the filing of such additional causes of action. Thus, it is clear that Plaintiff attempted to obtain a blanket stipulation in order to add claims without informing Toll.

As such, Plaintiff's Motion should be denied, at least as to the breach of contract and breach of covenant of good faith and fair dealing causes of action, for undue delay and dilatory tactics.

II. ARGUMENT AND AUTHORITIES.

In deciding whether justice requires granting leave to amend, factors to be considered include the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment. *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

1 Here, it is apparent that Plaintiff's counsel's motive in filing the instant motion
 2 is to engage in dilatory tactics by prolonging the litigation of this case in federal
 3 court, when the appropriate forum for this case is arbitration. Defendant has
 4 repeatedly requested Plaintiff's submission to arbitration and was forced to file the
 5 Motion to Compel Arbitration and to Stay the Proceedings, which is before this
 6 Court. Only after Defendant filed a Motion to Compel Arbitration, did Plaintiff's
 7 counsel attempt to obtain a stipulation.

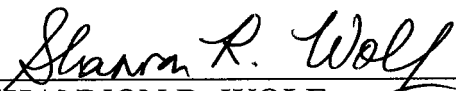
8 Even so, Plaintiff's attempt to obtain a stipulation from Defendant, was
 9 certainly not in good faith since Plaintiff's counsel never provided a copy of the
 10 proposed amended complaint, despite repeated requests. Moreover, Plaintiff seeks
 11 to add three additional causes of action, two of which Plaintiff should have
 12 previously filed since Plaintiff's purported reason for delay -- the filing of an
 13 administrative charge -- is not applicable to these claims since there is no
 14 requirement to exhaust an administrative remedy in order to file a breach of contract
 15 and breach of covenant of good faith and fair dealing claim. It appears that
 16 Plaintiff's counsel is unnecessarily prolonging the litigation of this case in federal
 17 court, without first waiting for a resolution regarding the appropriate forum.

18 **III. CONCLUSION.**

19 As such, Defendant respectfully requests that this Court deny Plaintiff's
 20 motion based on dilatory tactics and undue delay, at least as to the breach of contract
 21 and breach of covenant of good faith and fair dealing claims.

22
 23 Dated: July 3, 2008

ALLEN MATKINS LECK GAMBLE
 MALLORY & NATSIS LLP

24
 25 By: 
 26 SHANNON R. WOLF
 27 Attorneys for Defendant
 28 TOLL BROTHERS, INC.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss.:

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 1900 Main Street, Fifth Floor, Irvine, California 92614-7321.

On July 3, 2008, I served on interested parties in said action the within:

**DEFENDANT'S OPPOSITION TO MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT**

by placing a true copy thereof in sealed envelope(s) addressed as stated below and causing such envelope(s) to be deposited in the U.S. Mail at Irvine, California.

Kathleen M. Lucas, Esq.
The Lucas Law Firm
180 Montgomery Street, Suite 2000
San Francisco, California 94104

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Executed on July 3, 2008, at Irvine, California.

Stephanie S. Pattis

(Type or print name)



(Signature)